Supreme Court of the United States

OCTOBER TERM, 1963.

No. 157

R. B. PARDEN, ET AL.,
Petitioners,
versus

TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENTS.

RICHMOND M. FLOWERS,
As Attorney General of the State of Alabama,
State Capitol Building,
Montgomery, Alabama,
WILLIS C. DARBY, JR.,
307 First National Bank Building,
Mobile, Alabama.

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BRIEF OF RESPONDENTS.

I.

OPINION BELOW.

The United States District Court for the Southern District of Alabama did not render an opinion. The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the United States District Court for the Southern District of Alabama, is reported

as *Parden v. Terminal Railway of the Alabama State Docks Department*, 5 Cir., 1963, 311 F.2d 727; reprinted in Appendix I hereof.

II.

QUESTION PRESENTED FOR REVIEW.

May the State of Alabama be sued without its consent by a citizen of the State of Alabama in a district court of the United States on a claim based upon the Federal Employers' Liability Act for damages for personal injuries sustained by the citizen while employed by a railroad owned and operated by the State of Alabama as a common carrier engaged in interstate commerce?

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

In addition to those constitutional provisions and statutes specified in the petitioners' brief the following are involved:

CONSTITUTION OF THE UNITED STATES, ARTICLE III, SECTION 2, CLAUSE 1.

JURISDICTION OF COURTS.

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made,

or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CONSTITUTION OF ALABAMA, 1901, ARTICLE 1, SECTION 14.

That the State of Alabama shall never be made a defendant in any court of law or equity.

CODE OF ALABAMA 1940 (RECOMPILED 1958) TITLE 55, SECTION 333

Printed in Appendix II

CODE OF ALABAMA 1940 (RECOMPILED 1958) TITLE 55, SECTION 334

Printed in Appendix III

OPINION OF THE ATTORNEY GENERAL
STATE OF ALABAMA.
(JAN-MARCH, 1940 P. 286)

Printed in Appendix IV

IV.

STATEMENT OF THE CASE.

Parden and the other petitioners, all citizens of the State of Alabama, brought separate actions in the district court against the Terminal Railway of the Alabama State Docks Department for injuries sustained while employed on the Terminal Railway. (R. 4 et seq., 62 et seq., 68 et seq., 74 et seq., 81 et seq., 90 et seq.) The complaints alleged that jurisdiction was based upon the Federal Employers' Liability Act, 35 Stat. 65 et seq., 53 Stat. 1404 et seq., 45 U.S.C.A. 51 et seq. (R. 8, 63, 69, 75-6, 82, 90) and that the Terminal Railway was a department "within the Government of the State of Alabama." (R. 8, 63, 69, 75, 82.)

The State of Alabama appeared specially and moved to quash the return of service and dismiss the actions on the ground, among others, that the judicial power of the United States does not extend to controversies between citizens of a state and a state. (R. 12, 26.) The district court granted the motions after a hearing on the pleadings, depositions and affidavits. (R.

59-60.) The United States Court of Appeals for the Fifth Circuit affirmed. (R. 89 et seq.)

"The Terminal Railway was and is wholly owned and operated by the State of Alabama, consists of about fifty miles of railroad tracks in the area adjacent to the Alabama State Docks at Mobile, Alabama, serving in addition several industries situated in the general vicinity, and operating an interchange railroad with Alabama, Tennessee and Northern Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company and Gulf, Mobile and Ohio Railroad Company. A large percent of its operations are in interstate commerce; and it has contracts and working agreements with the various railroad brotherhoods, and makes reports to the Interstate Commerce Commission concerning injuries sustained by its employees, and keeps its accounts so as to comply with the regulations of the Interstate Commerce Commission." (R. 91.)

V.

SUMMARY OF ARGUMENT.

Parden does not contest the "established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission"; and a suit against a sovereign state cannot be entertained in the federal courts upon the ground that the controversy arises under the Constitution or laws of the

United States. *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991, 992; *Hans v. Louisiana*, 134 U.S. 1, 10, 16, 33 L. Ed. 842, 845, 847; *Monaco v. Mississippi*, 292 U.S. 313, 329, 78 L. Ed. 1282, 1289; *Missouri v. Fiske*, 290 U.S. 18, 25, 78 L. Ed. 145, 149.

Parden contends that Congress so regulated interstate commerce as to permit the State of Alabama to engage in interstate commerce only upon condition that the State of Alabama be amenable to suit in the federal courts under the Federal Employers' Liability Act, 35 Stat. 65 et seq., 53 Stat. 1404 et seq., 45 U.S.C. 51 et seq. Parden's argument presupposes (1) that Congress intended to condition a state's engaging in interstate commerce by rail upon the state's abandoning its constitutional immunity from suit in federal courts on causes of action arising under the Federal Employers' Liability Act and (2) that Congress has the constitutional power to strip a state of immunity from suit as a prerequisite to the state's engaging in interstate commerce as a common carrier by rail.

The legislative history of the Federal Employers' Liability Act reveals that its purpose was "to change the common-law liability of employers of labor . . . for personal injuries"; nothing in the legislative history of the Federal Employers' Liability Act indicates an intention to create new and unheard of remedies, by subjecting sovereign states to actions in the federal courts by individuals because a sovereign state engaged in interstate commerce by rail. H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1906) 42 Cong. Rec. 4426-4439, 4526-4551 (1908).

Assuming arguendo, that Congress intended to condition a state's engaging in interstate commerce by rail upon the state being amenable to suit in a federal court under the Federal Employers' Liability Act, such a condition is beyond the power of Congress, unconstitutional and void. "The inherent nature of sovereignty prevents actions against a state by its own citizen without its consent." *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 51, 88 L. Ed. 1121, 1125. Congress does not have the power to require a state to be amenable to suit in a federal court. U.S. Const. art. III § 2, Cl. 1; U.S. Const. amend. XI. Congress cannot impose a condition upon a state's engaging in interstate commerce by rail which is beyond the power of Congress to impose directly. *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 502-3, 52 L. Ed. 297, 310-11. Congress may not require a state to sacrifice, waive or surrender its constitutional immunity from suit any more than a state can condition a foreign corporation's doing business in the state on the sacrifice of a right guaranteed by the Constitution of the United States. *Hanover Fire Insurance Company v. Harding* (*Hanover Fire Insurance Company v. Carr*) 272 U.S. 494, 514-5, 517, 71 L. Ed. 372 382-3; *The Home Insurance Company of New York v. Morse*, 20 Wall. 445, 453-8, 22 L. Ed. 365, 369-70; *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 571; 93 L. Ed. 1544, 1551.

Reason and authority compel the conclusion that Congress neither has the power to or intended to strip the sovereign State of Alabama of its constitu-

tional immunity from suit by its own citizens when Congress enacted the Federal Employers' Liability Act.

VI.

ARGUMENT.

A.

The Federal Employers' Liability Act Does Not Create A Cause Of Action Against A State Or Confer Jurisdiction On Federal Courts To Entertain An Action Against A State Without Its Consent.

Parden's argument assumes that Congress by enacting the Federal Employers' Liability Act intended to create a cause of action against a sovereign state engaging in interstate commerce by rail as a common carrier.

The legislative history of the Federal Employers' Liability Act conclusively shows that Congress did not intend to subject a sovereign state to suit in the courts of the United States by its employees merely because the state happened to be engaging in interstate commerce by rail. The House Report, H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) states:

> The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an

> employee, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. It permits a recovery by an employee for an injury caused by the negligence of a coemployee; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury.

The debate in the Senate, 42 Cong. Rec. 4526 et seq., particularly 4532, 4534-5 and 4539-42 (1908) conclusively shows that the Senate was particularly concerned about the constitutionality of the Act and although much was said of this Court's decision in *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 52 L. Ed. 297, declaring the First Employers' Liability Act unconstitutional, nothing whatsoever was said about the then unique proposition that Congress had the power to annul the Constitution of the United States and to strip a sovereign state of its immunity from suit.

A subsequent Act of Congress and decisions of this Court established beyond doubt that the term "common carrier by railroad" as used in the Federal Employers' Liability Act did not include the operation of a railroad by a sovereign. Congress in the Federal Control Act, 40 Stat. at L. 451, provided that suits under the Federal Employers' Liability Act, among others, could be brought directly against the United States when the United States federalized and operated the railroads. This Court in *Dahn v. Davis*, 258 U.S. 421, 66 L. Ed. 696, and *Johansen v. United States*, 343 U.S. 427, 438-9, 96 L. Ed. 1051, 1059-60 recognized that the

liability of the United States under the Federal Employers' Liability Act during federal operation of the railroads was based upon the Federal Control Act.

There is little doubt that had Parden been employed by the United States in the operation of a common carrier by rail at the time of his alleged injury, Parden would not have a cause of action against the United States under the Federal Employers' Liability Act but rather would be entitled to the benefits of the Federal Employees Compensation Act, 39 Stat. 742, 5 U.S.C. Sections 751 et seq. There is nothing in the Federal Employers' Liability Act to justify a distinction between a common carrier by rail operated by a sovereign state and a common carrier by rail operated by the United States.

United States v. California, 297 U.S. 175, 80 L. Ed. 567, and *California v. Taylor*, 353 U.S. 553, 1 L. Ed. 2d 1034, relied upon by Parden, are inapposite to this cause. Neither *California v. Taylor, supra*, nor *United States v. California, supra*, involved the unique proposition raised here that Congress intended directly or indirectly to strip a sovereign state of its constitutional immunity from suit. *United States v. California, supra*, was a suit brought by the United States against California to recover a statutory penalty for violation of the Federal Safety Appliance Act, 27 Stat. at L. 531, 45 U.S.C.A. Section 2 and Section 6. It had long been established when this Court decided *United States v. California, supra*, that the judicial power granted by the Constitution of the United States embraced a suit by the United States against a state. *United States*

v. North Carolina, 136 U.S. 211, 34 L. Ed. 336; *United States v. Texas*, 143 U.S. 621, 36 L. Ed. 285. In *California v. Taylor*, 353 U.S. 553, 568, 1 L. Ed. 2d 1034, 1044, this Court specifically refused to pass upon the question of whether a state could be sued by an individual to enforce an award of the National Railroad Adjustment Board.

Moreover, Congress did not intend to confer jurisdiction upon the federal courts to entertain an action by a citizen against a state under the Federal Employers' Liability Act.

Section 6 of the Federal Employers' Liability Act 35 Stat. 66 as amended, 45 U.S.C. 56 provides:

> The jurisdiction of the courts of the United States under this chapter shall be *concurrent with that of the courts of the several States.* (Emphasis supplied.)

The language employed by Congress in conferring jurisdiction on the courts of the United States is in all salient respects identical to the language employed by Congress to confer jurisdiction on the federal courts in matters arising under the Constitution and laws of the United States in the Act of March 3, 1875, namely:

> The circuit courts of the United States shall have original cognizance *concurrent with the courts of the several States* of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States . . . (Emphasis supplied.)

In *Hans v. Louisiana*, 134 U.S. 1, 10, 16, 33 L. Ed. 842, 845, 847 this Court held that the Act of March 3, 1875 conferring jurisdiction on the federal courts did not purport to include a grant of jurisdiction to the federal courts to entertain a suit by a citizen against his own state. The compelling factor in the decision in *Hans* was that by the use of the term "concurrent with the courts of the several States", Congress did not intend to invest its courts with any new and strange jurisdiction; that since state courts have no power to entertain suits by individuals against a state without its consent, then the courts of the United States, having only concurrent jurisdiction, did not acquire any such power.

The use of the judiciably interpreted phrase "concurrent with that of the courts of the several States" conclusively establishes that Congress did not intend to confer jurisdiction on the federal courts under Section 6 of the Federal Employers' Liability Act to entertain a suit by a citizen against a state without its consent.

B.

Congress May Not Impose A Condition Which Is Repugnant To The Constitution Of The United States As A Prerequisite To A State's Engaging In Interstate Commerce As A Common Carrier By Rail.

In *Hans v. Louisiana*, 134 U.S. 1, 33 L. Ed. 842, this Court after full consideration held that a suit against a state, without its consent, by one of its own citizens

was unknown to and forbidden by law and "that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent." *Duhne v. New Jersey*, 251 U.S. 311, 313, 64 L. Ed. 280, 281; *Fitts v. McGhee*, 172 U.S. 516, 524, 529, 43 L. Ed. 535, 539, 541; *Missouri v. Fiske*, 290 U.S. 18, 25, 78 L. Ed. 145, 149; *Monaco v. Mississippi*, 292 U.S. 313, 329-30, 78 L. Ed. 1282, 1289. A suit by a citizen "cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States." *Missouri v. Fiske*, 290 U.S. 18, 26, 78 L. Ed. 145, 149 and cases cited therein. A state's immunity from suit is a "constitutional right". *Great Northern Life Insurance Company v. Read*, 322 U.S. 47, 51, 88 L. Ed. 1121, 1125.

Parden contends that Congress conditioned a state's engaging in interstate commerce by rail as a common carrier upon the state's acceptance of the liabilities imposed by the Federal Employers' Liability Act and that by engaging in interstate commerce by rail as a common carrier, the State of Alabama waived any immunity which it otherwise might have had. Petitioners' Brief Page 15.

Parden's argument presupposes that Congress has the constitutional power to strip a state of its constitutional immunity from suit as a prerequisite to the state's engaging in interstate commerce as a common carrier by rail. Parden's argument involves two dis-

tinct powers. One of these is the power to prohibit a state from engaging in interstate commerce by rail. The other is the power to compel a state to waive its constitutional immunity from suit. *Cf. Frost v. Railroad Commission of the State of California*, 271 U.S. 583, 592-3, 70 L. Ed. 1101, 1104.

Parden does not contend that Congress could directly strip a state of its sovereign immunity from suit by a citizen. Any such contention must fall under the Eleventh Amendment of the Constitution "expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts . . . that the Constitution should not be construed to import any power" to authorize a suit by a citizen against a state without its consent. *Hans v. Louisiana*, 134 U.S. 1, 11, 33 L. Ed. 842, 846.

May Congress accomplish indirectly, what the Eleventh Amendment would strike down if attempted directly, by imposing a condition that is repugnant to the Constitution?

In analogous situations this Court has held that a legislative body may not impose conditions repugnant to the Constitution on the exercise of a privilege although the legislative body had the authority to deny the privilege outright.

In *Frost v. Railroad Commission of the State of California*, 271 U.S. 583, 593-4, 70 L. Ed. 1101, 1104-5 after holding that under the Fourteenth Amendment a

private carrier cannot be converted against his will into a common carrier by mere legislative command, this Court held that the state could not condition a private carrier's use of the state's roads on the private carrier's assumption against his will of the duties and burdens of a common carrier and thereby accomplish indirectly what it could not do directly, saying:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

This Court has frequently held that although a state has the unqualified right to exclude a foreign corporation from doing business within the state's boundaries, the state may not require the corporation to surrender a right guaranteed by the Constitution of the United

States as a prerequisite to doing business within the state. *Home Insurance Company of New York v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *Hanover Fire Insurance Company v. Harding* (*Hanover Fire Insurance Company v. Carr*) 272 U.S. 494, 71 L. Ed. 372; *Terral v. Burke Construction Company*, 257 U.S. 529, 532-3, 66 L. Ed. 352, 354. *Cf. Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 93 L. Ed. 1544. In *Home Insurance Company of New York v. Morse*, 20 Wall. 445, 22 L. Ed. 365, the State of Wisconsin required foreign insurance companies to enter into a written agreement that such company would not remove a suit for trial from the state court into the courts of the United States as a condition of doing business in the State of Wisconsin. This Court held that the company had an unqualified and unrestrained federal right to have cases transferred to the federal courts and therefore the condition was repugnant to the Constitution and laws of the United States, and the agreement being obtained under compulsion was therefore unconstitutional and void. In *Hanover Fire Insurance Company v. Harding*, 272 U.S. 494, 517, 71 L. Ed. 372, 383, this Court specifically rejected the argument that a foreign corporation by coming into a state and engaging in business on the conditions imposed, waives all constitutional restrictions and cannot object to a condition or law regulating its obligations even though as a statute operating in invitum it may be in conflict with constitutional limitations.

This Court in declaring the First Employers' Liability Act unconstitutional specifically rejected the theory that "one who engages in interstate commerce thereby

comes under the power of Congress . . . and may not complain of any regulation which Congress may choose to adopt." *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 499, 502-3, 52 L. Ed. 297, 309, 310-11. *Howard* established that Congress may not indirectly under the guise of regulating interstate commerce require a person to surrender a constitutional right or privilege as a prerequisite to engaging in interstate commerce as a common carrier. We submit that the language of this Court in *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 502-3, 52 L. Ed. 297, 310-11 is applicable here:

> It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congres may prescribe; even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would

> extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures.

If Congress has the power to impose a condition repugnant to the Constitution as a prerequisite to a state's engaging in interstate commerce, then Congress has the power to regulate every aspect of every state's affairs for today every state in this great nation engages in interstate commerce by the use of the mails and telephones in the day to day conduct of its affairs, each state engages in interstate commerce through its network of roads, each state purchases supplies that move in interstate commerce, and most if not all states market their bonds in interstate commerce. Substantially every activity of a state from aid to dependent children to the conduct of affairs of state affects interstate commerce.

Reason and authority compel the conclusion that Congress lacks power to condition a state's engaging in interstate commerce by rail upon the state's forfeiture of its sovereign immunity from suit.

Parden's argument also assumes that Congress in enacting the Federal Employers' Liability Act intended to condition a state's engaging in interstate commerce by rail upon the state foregoing its immunity from

suit. We recognize that Congress in exercising its power to regulate commerce, may exercise its control over instrumentalities of commerce to prohibit their use to obtain ends that are within its Constitutional powers. *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, 437, 442-3, 82 L. Ed. 936, 945, 947-8. However, when Congress has exercised this power Congress has always done so by the use of clear, specific and concise language. 74 Stat. 671, 76 Stat. 1144, 39 U.S.C.A. 4369 (second class mail); 49 Stat. 812, 15 U.S.C.A. 79c (gas, electric energy and use of mails and instrumentalities of commerce); 52 Stat. 1067, 29 U.S.C.A. 212 (interstate transportation of goods produced by oppressive child labor). We have found no case where Congress has forbidden a person from engaging in commerce by implication. We submit that no basis exists here for a presumption that Congress conditioned a state's engaging in interstate commerce by rail upon the state's being amenable to suit in a federal or state court.

C.

The State Of Alabama Has Not Waived Its Constitutional Immunity From Suit.

This Court has consistently held that waiver by a state of its sovereign immunity from suit must be clearly shown and that the question of waiver must be determined under state law. *Ford Motor Company v. Dept. of Treas. of Indiana*, 323 U.S. 459, 466-470, 89 L. Ed. 389, 395-8.

Section 14 of the Constitution of the State of Alabama provides:

> That the State of Alabama shall never be made a defendant in any court of law or equity.

Under the Constitution of the State of Alabama neither the legislature nor a state officer has the power to waive the State's sovereign immunity from suit. *Dunn Construction Co., Inc. v. State Board of Adjustment*, 1937, 234 Ala. 372, 175 So. 383, 386; *State Tax Commission v. Commercial Realty Co.*, 1938, 236 Ala. 358, 182 So. 31, 35.

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466. A waiver of sovereign immunity must be made by the "most express language, or by such overwhelming implication from the text as would leave no room for any other reasonable construction." *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 53 L. Ed. 742, 751. Here, the Constitution of the State of Alabama prohibits a waiver. Neither the officials nor the citizens of the State of Alabama were placed on notice, that by engaging in interstate commerce by rail, the State would thereby become amenable to suit by its citizens. *Cf. Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292, 306-7, 81 L. Ed. 1093, 1102-3. The State of Alabama has never intentionally abandoned its immunity from suit; indeed, it has specifically envoked its immunity. *State Docks Commission v. Barnes*, 225 Ala. 403, 143 So. 581;

Kansas City Bridge Co. v. Alabama State Bridge Corporation, 1932, 5 Cir., 59 F.2d 49, cert. deni. 287 U.S. 644, 77 L. Ed. 557.

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 3 L. Ed. 2d 804, relied upon by Parden is inapposite. In *Petty* a divided court, six to three, held that since the question of waiver arose from an interstate compact, the Court was not called on to interpret unilateral state action, "but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with Congressional approval," was a question of federal law. The compact in *Petty* specifically provided that the authority had the power "to sue and be sued in its own name". Three of the majority, Mr. Justice Black, Mr. Justice Clark and Mr. Justice Stewart concurred in the result without reaching the constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more states under state compacts. Tennessee and Missouri drafted their compact, accepted it after Congressional approval, knew the terms of the compact, the approving legislation and knew its interpretation was a matter of federal law. The State of Alabama had no reason to expect that it would be charged with waiving its constitutional immunity from suit when it began operations as a common carrier by rail in 1927. (R. 21.)

Moreover, the fact that the State of Alabama has adopted a workmen's compensation law for its employees, including Parden, Code of Alabama 1940 (Re-

compiled 1958) Title 55 §§ 333-4, Appendices II and III; Opinion of the Attorney General of the State of Alabama, Appendix IV; *State Board of Adjustment v. Lacks*, 247 Ala. 72, 22 So. 2d 377, is presumptive that the State did not intend to waive its immunity from suit. *Johansen v. United States*, 343 U.S. 427, 440, 96 L. Ed. 1051, 1060.

Reason and authority compel the conclusion that the sovereign State of Alabama has not knowingly or by implication waived its sovereign immunity from suit.

CONCLUSION.

The judgment of the United States Court of Appeals for the Fifth Circuit rendered January 3, 1968 (R. 103-4) should be affirmed.

Respectfully submitted,

RICHMOND M. FLOWERS,
As Attorney General of the State of Alabama,
State Capitol Building,
Montgomery, Alabama,

WILLIS C. DARBY, JR.,
Attorneys for Respondents,
307 First National Bank Building,
Mobile, Alabama.

CERTIFICATE AS TO SERVICE.

I, Willis C. Darby, Jr., hereby certify that I have mailed a copy of the foregoing Brief properly addressed to Honorable Al G. Rives and Honorable Timothy M. Conway, Jr., counsel of record for Petitioners, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the 28 day of January, 1964.

WILLIS C. DARBY, JR.

[redacted]

APPENDIX I.

[fol. 115] **Corrected**

In United States Court of Appeals
For the Fifth Circuit

No. 19519

R. B. Parden, et al., Appellants,

versus

Terminal Railway of the Alabama State Docks Department, et al., Appellees.

Appeal from the United States District Court for the Southern District of Alabama

Opinion—January 3, 1963

Before RIVES, CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: This appeal involves the question whether the State of Alabama may be sued by its citizen in a District Court of the United States on a claim based upon the Federal Employers Liability Act[1] for damages [fol. 116] for personal injuries

[1] Title 45 U.S.C.A. § 51:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or any insufficiency, due to its negligence, in its cars, engines, appliances, machinery . . . or other equipment."

Concurrent jurisdiction of actions under the statute is conferred by 45 U.S.C.A. § 56 in state and federal courts.

sustained by its citizen while employed by a railroad belonging to the State of Alabama which was operated as a common carrier in interstate commerce and while he was so engaged. The action[3] was brought against Terminal Railway, Alabama State Docks; and the Sovereign State of Alabama, entering its appearance specially, moved to quash the return of summons on it or to dismiss the action, on the grounds that the Terminal Railway was an agency of the State, that the State had not consented to be sued or waived its immunity, and that the judicial power of the United States did not extend to this controversy because it is between a citizen of Alabama and the State of Alabama. Both motions were heard on the face of the pleadings supplemented by four affidavits and two depositions and were [fol. 117] granted by the court below in an order stating:

"It is Ordered by the Court that the motion of the Sovereign State of Alabama to quash return

[3] Besides the action brought by R. B. Parden for personal injuries sustained July 13, 1958, four other actions were brought which involve the same jurisdictional facts as Parden's claim, varying only in the details of the facts as to liability and the injuries received. These four are: a second action filed by Parden for personal injuries sustained June 3, 1958; action by Otto Driskell alleging two injuries received by him on July 22, 1958; action by Mrs. Elizabeth W. Wiggins and Frank E. Burge, Jr., Administrators of the estate of John Irvine Wiggins, deceased, based on claims for two injuries received by him November 15, 1958 contributing to his death; and action by Aubrey E. Price claiming two separate personal injuries occurring Oct. 2, 1959, one based upon the Federal Employers Liability Act and the second upon the Federal Safety Appliance Act, 45 U.S.C.A. § 2. The several actions were consolidated for trial in the court below and for purposes of this appeal.

The first action of R. B. Parden will be discussed in most instances, but everything herein said will have reference also to the other four civil actions.

of service of summons be, and the same hereby is, Granted, and

"It is Further Ordered by the Court that the motion of the Sovereign State of Alabama to dismiss the action be, and the same hereby is, Granted, with costs herein taxed against the Plaintiff."

The parties do not contend on appeal that there is any dispute about the facts, but agree that the case presents only questions of law. The basic facts are here set forth and others will be adverted to in our discussion of the several arguments:

The Terminal Railway was and is wholly owned and operated by the State of Alabama, consists of about fifty miles of railroad tracks in the area adjacent to the Alabama State Docks at Mobile, Alabama, serving in addition several industries situated in the general vicinity, and operating an interchange railroad with Alabama, Tennessee and Northern Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, and Gulf, Mobile and Ohio Railroad Company. A large percent of its operations are in interstate commerce; and it has contracts and working agreements with the various railroad brotherhoods, and makes reports to the Interstate Commerce [fol. 118] Commission concerning injuries sustained by its employees, and keeps its accounts so as to comply with the regulations of the Interstate Commerce Commission.

Appellant Parden argues that the owner of every common carrier by railroad engaging in interstate

commerce is liable for injuries to its employees so engaged under the clear and all-embracing language of the F.E.L.A. quoted in footnote 1, *supra*;[3] that the State of Alabama is so liable because it operates this railroad under constitutional amendment[4] and statute;[5] and that, under the Commerce Clause of The United States Constitution and three Supreme Court cases hereinafter considered, it is subject to and liable under F.E.L.A. and the Safety Appliance Act to the same extent as an individual.

Alabama counters with the contention that the whole sum of the judicial power granted by the Constitution to the central government does not embrace any authority in its courts to entertain a suit brought by a citizen against his own State; and that the State of Alabama has not waived its immunity from suit. The appellant responds by asserting that the general principles relied upon by the State do not apply where the State is deemed to have consented to suit; and that, since Alabama is not protected by the Eleventh Amendment to the Constitution, it is deemed to have consented by the mere fact that it entered [fol. 119] into and conducted the operation of an interstate railroad under the statutory and organic law of the State.[6]

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[3] And under the Federal Safety Appliance Act, Title 45, U.S.C.A. § 2, as to one of the civil actions now before us.

[4] Alabama Constitution 1901, Amendments 12 and 116.

[5] 1940 Code of Alabama (Recompiled, 1958) Title 38, §§ 17 and 45 (14, 16).

[6] Appellant's position is well epitomized in the following excerpts from its reply brief:

> "None of the authorities cited under this subdivision of the opposing argument hold that the judicial power of the United States does not embrace the authority to entertain a suit brought by a citizen against his own state, where the State

We do not agree that the State of Alabama, by the mere fact that it legally operated an interstate carrier, surrendered its right not to be sued, which belongs to the Union and all the States in it, except as explicitly provided otherwise in the Constitution. It is conceded that Alabama could not be sued by a citizen of another State seeking to assert the identical right claimed here. This, the appellant conceives to be a protection vouchsafed by the Eleventh Amendment which, it says, Alabama does not possess when it is sued by its own citizen. We think this attitude arises from a misunderstanding of the effect of the Eleventh Amendment and of the status of the States of the Union independent of it. This is made clear by a brief consideration of the history of the Amendment as developed in decisions of the Supreme Court.

[fol. 120] Almost before the ink had dried on the signatures to the Constitution, a citizen of South Carolina filed suit against the State of Georgia in the Supreme Court of the United States asserting jurisdiction under Article III, Section 2, Clause 1 of the Con-

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has consented to such suit. . . .

"We urge that it is a sound construction of the Federal Employers Liability Act, when considered in the light of Supreme Court decisions concerning the Safety Appliance Acts and the Railway Labor Act, that Congress has prohibited any entity, state or private, from engaging in business as an interstate common carrier railroad, without consenting to be sued in a United States District Court under the Federal Employers Liability Act. . . .

"As we see it, if the Constitution of the State of Alabama authorizes the operation of this railroad, then it is subject to all the provisions of the Federal Employers Liability Act. Liability under the Act can be avoided only if the State is acting unconstitutionally by operating the Terminal Railway of Alabama State Docks."

stitution.[7] The Supreme Court[8] upheld the claimed right in a decision whose essence the syllabus sums up in these words: "A State may be sued, in the Supreme Court, by an individual citizen of another State . . ."

The people, who had just adopted a Constitution which delegated certain powers to the central government, did not agree with this construction of what they had written; and they promptly adopted the Eleventh Amendment: "The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." [Emphasis supplied.]

The Amendment dealt solely with the prepositional phrases—"between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects"—being cast in the precise words of those phrases. And it dealt with the *construction* of those phrases only, stating without equivocation that the grant of power was not to be construed as authorizing a citizen or subject to sue another State. It directed simply that no court considering that phrase should have the power to construe [fol. 121] it other than as directed by the Eleventh Amendment. The Amendment did not add anything to the Constitution

[7] "The judicial Power shall extend . . . to controversies . . . *between a State and Citizens of another State;* . . . and *between a State . . . and foreign States, Citizens or Subjects.*" [Emphasis added.]

[8] Chisolm, Executor v. Georgia, 1793, 2 U.S. 419.

and did not take anything from it. It simply gave directions as to the meaning of a phrase already in the Constitution. It was definitely a limitation on the right of any court to construe that language of the Constitution in such a way as to diminish the immunity from suit which is an essential and universal attribute of sovereignty.

It was not necessary that the Amendment negate the right of a citizen to sue his own State because Article III of the Constitution, which alone deals with the federal Judiciary and defines the judicial power being delegated to the central government, nowhere mentions or hints at a case or controversy between a State and its own citizens as being justiciable by any court. As against its own citizens, therefore, a State did not need and has never needed the shelter or protection of the Eleventh Amendment.

It was almost a century after *Chisolm v. Georgia* and the Eleventh Amendment before the Supreme Court was faced with a suit brought by a citizen against his own State, *Hans v. Louisiana*, 1890, 134 U. S. 1. Jurisdiction in the Circuit Court was claimed under Article III of the Constitution, which declares that "The Judicial Power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made . . .," and the Act of March 3, 1875, 18 Stat. 470, c. 137, §1, now 28 U.S.C.A. §1331 (a), vesting in the Circuit Courts jurisdiction "of all suits of a civil nature at common law or in equity, arising under the

Constitution or laws of the United States, or treaties [fol. 122] made . . ." The lower court dismissed the suit and the Supreme Court affirmed without a dissent.

The opinion analyzes thoroughly the decision in *Chisolm v. Georgia*, the Eleventh Amendment, and the debates among the writers of the Constitution, and, in addition, those between Mason and Patrick Henry on one side and Madison and Marshall on the other, in the Virginia Convention. It quotes from Madison: "Its jurisdiction [the Federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court"; and from Marshall: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the Federal Court . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . ." And it characterizes the contention that the passage of the Eleventh Amendment had the effect of leaving a State open to suit by its own citizens in cases arising under the Constitution or laws of the United States as ". . . supposition . . . almost an absurdity on its face." [Pp. 14 and 15.]

After quoting from a statement by Chief Justice Taney in *Beers et al. v. Arkansas*, 20 Howard 527, 529: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, [fol. 123] or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued . . ."; the opinion states its conclusion thus:

> "It is not necesary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence . . ."

This decision in *Hans v. Louisiana* has been cited as authority by the Supreme Court in approximately thirty cases.[9]

This line of cases constitutes a continuing affirmation by the Court of the basic principle that the federal judicial system is one of enumerated powers, not of

[9] E.g., Ford Motor Co. v. Dept. of Treas. of Indiana, 323 U.S. 459, 464; Great Northern Ins. Co. v. Read, Ins. Comm., 1944, 322 U.S. 47, 51; Monaco v. Mississippi, 1934, 292 U. S. 313, 322; Williams v. United States, 1933, 289 U.S. 553, 575; Ex parte State of New York, 1921, 256 U. S. 490, 497; Duhne v. New Jersey, 1920, 251 U. S. 311, 313; Palmer v. Ohio, 1918, 248 U.S. 32, 34; Ex parte Young, 1908, 209 U.S. 123, 150.

enumerated limitations upon power. The lack of power in the court below, therefore, to entertain a suit by the individual against the State is not dependent upon the negative language of the Eleventh Amendment, which merely points out that such power is not given, but on the basic fact that such power is not lodged in the federal judiciary under our constitutional system.

[fol. 124] It is clear, therefore, that a State has the same constitutional immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State.

The *Ford Motor Company* case, *supra*, stands for the well settled rule that waiver by a State of its sovereign immunity must be clearly shown, and that whether such a waiver has been established presents a question to be decided under State law (pp. 466-470). And *cf. Louisiana Land and Exploration Co. v. State Mineral Board*, 5 Cir., 1956, 229 F.2d 5, certiorari denied, 351 U. S. 975.

The Supreme Court of Alabama considered the provisions of the Alabama Constitution and statutes involved in the case before us in *State Docks Commission v. Barnes*, 1932, 143 So. 581. It was there decided that a claim for the death of one of the employees of of the State Docks Commission was a claim against the State, which was "performing a business or cor-

porate power and not a governmental function." Continuing, the court said (page 582):

> "But Section 14 of the Bill of Rights of the Alabama Constitution provides that the State shall never be made a defendant in any court of law or equity. The State cannot consent to such a suit. This means not only that the State itself may not be sued, but that this cannot be indirectly accomplished by suing its officers or agents in their official capacity, when a [fol. 125] result favorable to plaintiff would be directly to affect the financial status of the State treasury . . ."

"The right to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers v. Arkansas*, 20 Howard 527; *Railroad Company v. Tennessee*, 101 U. S. 337; *Hans v. Louisiana*, 134 U. S. 1." So says the Supreme Court in *Palmer et al. v. State of Ohio*, 1918, 248 U. S. 32. And it is not contended that Alabama has given its express consent, but, on the contrary, its Supreme Court has held that it cannot so consent.

It is pertinent to mention that the State of Alabama has provided payment for injury to or death of any employee of the agency here involved "where in law, justice or good morals the same should be paid;" and that the remedy so provided is characterized by the Supreme Court as "a workmen's compensation law for State employees," *State Board of Adjustment v. Lacks*, 1945, 22 So. 2d 377; and *cf. Hawkins v. State Board of Adjustment*, S. Ct. Ala., 1942, 7 So. 2d 775.

It remains but to consider the three Supreme Court cases upon which appellant bases his chief reliance. The appellant frankly points out that none of the cases are applicable on their facts, but contends that some of the language found in the opinions warrants the assumption that, by operation of law, Alabama necessarily waived its immunity from suit by electing to operate a common carrier engaged in interstate commerce. The language of each of the cases is, of course, limited to the facts with which the Court was dealing.

[fol. 126] In *United States v. California*, 1936, 297 U. S. 175, it was claimed that § 6 of the Safety Appliance Act vested jurisdiction in the district court to entertain the suit by the United States for a statutory penalty imposed for violation of the Act. The application of the decision of the Supreme Court in that case, insofar as it has possible relation to the question before us, is thus pinpointed at page 187:

> "Article III, § 2 of the Constitution extends the judicial power of the United States and the original jurisdiction of the Supreme Court to cases 'in which a State shall be a party.' . . . But Congress may confer on inferior courts concurrent original jurisdiction of such suits. . . . Section 233 of the Judicial Code, 28 U.S.C., 341 . . . gives to this Court 'exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens or between a State and citizens of other States or aliens.'"

The Court then goes on to decide that the later enacted § 6 of the Safety Appliance Act provides that the penalty which it imposes supersedes, for practical reasons, the provisions of the Judicial Code and, therefore, vests in the district court jurisdiction to recover the penalty against the State. The power to maintain the suit against the State is specifically vested by the Constitution in the United States. The case does not hint that an individual in whom the Constitution does not vest such a power could maintain such a suit against a State.

The action in *California v. Taylor, et al.*, 1957, 353 U. S. 553, was brought by five employees of the State Belt Railroad [fol. 127] operated by the Board of State Harbor Commissioners of California against the ten members of the National Railroad Adjustment Board, First Division, and its Executive Secretary. The United States, answering on behaf of the Board, supported the charges in the complaint that the Belt Road was governed by the Railway Labor Act of 1926 rather than by the Civil Service Laws of the State of California. The State of California intervened as a party defendant and opposed the claim of the employees of the Belt Railroad in which they sought to invoke the machinery of the Railway Labor Act. The Supreme Court held that the operation of the Belt Railroad was covered by the Railway Labor Act, and referred to the fact that several State courts, including an intermediate appellate court of California,[10] had held state owned belt railroads such as the ones here involved

[10] Maurice v. State, Dist. Ct. App., Cal., 1941, 110 P.2d 706.

subject to the Federal Employers Liability Act. Following its decision in *United States v. California, supra*, the Supreme Court held that Congress had the right to regulate the California Belt Railroad's employment relationships. In Note 16, page 568, however, the Supreme Court stated:

> "The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Labor Relations Board in a suit against the State in a United States District Court under §3, First (p) of the Act is not before us under the facts of this case."

This statement by the Supreme Court disposes of the contention [fol. 128] of the appellants that this case is authority for the contention that Alabama had waived its immunity from suit.

Petty v. Tennessee-Missouri Bridge Commission, 1959, 359 U. S. 275, involved the question whether Tennessee and Missouri had waived their immunity to be sued w en those States entered into a compact, with Congre: ional approval, for the construction of a bridge ov(the Mississippi River. To build and manage the bridge, there was created the Tennessee-Missouri Bridge Commission, a "body corporate and politic," wherein it was provided that the Commission had the power "to contract, to sue and be sued in its own name." The Court, after noting that "The conclusion that there has been a waiver of immunity will

not be lightly inferred, *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 171," decided that, under the facts of that case and "where the waiver is, as here, claimed to arise from a compact between several States," the Commission was suable under the sue-and-be-sued clause interpreted in the light of the conditions attached by Congress in approving the bridge over the navigable stream.[11] We think that the case is not authority for the waiver claimed here, and refer to the language used by this Court in *McDermott* [fol. 129] *& Co. v. Department of Highways, State of Louisiana.*[12]

Based upon the authorities cited and the foregoing reasons, we hold that the State of Alabama is constitutionally immune from suit under the facts before us and that there has been no waiver of this immunity.

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[11] In a footnote, Mr. Justice Frankfurter, dissenting (page 289), stated the following:

"Suit in United States v. California, 297 U.S. 175, was instituted by the United States, and jurisdiction over such an action is not within the proscription of the Eleventh Amendment. In California v. Taylor, 353 U. S. 553, the State intervened in an action brought against the National Railroad Adjustment Board, hence voluntarily submitted itself to the jurisdiction of the federal courts."

[12] 5 Cir., 1959, 267 F. 2d 317, 318.

"Appellee, in its turn, citing, as settling the law to the contrary of this contention, other cases and Petty v. Tenn.-Mo. Bridge Comm., 8 Cir., 254 F. 2d 857, reversed (three judges dissenting) in Petty v. Tenn.-Mo. Bridge Comm., 358 U.S. 811 . . . not in principle but on the sole ground that the Act of Congress approving the interstate compact had made provision for the suit there brought, urges upon us that the judgment must be affirmed.

"This Court in a case involving a collision with a bridge in Broward County, Florida [Broward County, Florida v. Wickman, 5 Cir., 195 F. 2d 614], has settled it for this Circuit, as the Supreme Court in Ex parte, State of New York, 356 U. S. 490, . . . has for the country as a whole, that 'the immunity of a State from a suit in personam in the admiralty brought by a private person without its consent is clear.'"

The judgments entered in the captioned case and the others consolidated with it by order of the court below are

AFFIRMED.

BROWN, Circuit Judge, concurring specially:

I concur in the result and in much of the Court's opinion.

But in at least two places the Court states that "the State of Alabama is *constitutionally* immune from suit." —— F. [fol. 130] 2d ——.[1] Apart from the Eleventh Amendment, I find nothing in the Constitution nor in the elaborate structure of the opinion in *Hans v. Louisiana*, 1890, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842, to support that conclusion as a matter of federal constitutional law. Sovereign immunity, threadbare as it generally is, is recognized in law. It may, as it does here, deny effectual enforcement to a clear legal right. But that does not raise this notion to the stature of a federal constitutional right.

Moreover, I think the constitutional crisis generated by *Chisholm v. Georgia*, 1792, 2 U. S. 2 Dall 419, 1 L. Ed. 440, refutes this Court's thesis that when it was all said and done the Eleventh Amendment "• • • did not add anything to the Constitution and did not take anything from it." —— F. 2d ——. And to the extent

[1] See also: "It is clear, therefore, that a State has the same *constitutional* immunity from suit by its own citizens as it has in suits brought against it by citizens of other States, and the courts will apply the same tests in determining whether the State has waived its immunity against its own citizen as it would apply if the suit were by a citizen of another State." —— F. 2d ——.

that *Hans v. Louisiana* really puts the result on the basis of the traditional immunity of a State, rather than on the obvious implications of the Eleventh Amendment, it seems clear to me that the Supreme Court did not undertake to cast it,[2] as does [fol. 131] this Court, in terms of a Constitution of enumerated powers and the "basic fact that such power is not lodged in the federal judiciary under our constitutional system." —— F. 2d ——. This latter would, among other things, mean that *jurisdiction* would be conferred by consent (of the sovereign waiving its immunity). This certainly contradicts a basic concept of a limited federal jurisdiction.

What the case presents is the anomaly of a clear legal right without any means of effectual enforcement. Without a doubt, Alabama and its operating agencies, the Terminal Railway and Docks Department are subject to the FELA. It is even likely that its scheme of vicarious workmen's compensation constitutes an outright violation of the Act which prohibits any contract, rule, regulation or device to enable a

[2] The strongest statement in *Hans* in this direction is: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U. S. 1, 15.

The Court speaks again in terms of suits unknown to or forbidden by law in Fitts v. McGhee, 1899, 172 U. S. 516, 524, 19 S.Ct. 269, 43 L.Ed. 535.

> "Is this a suit against the state of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a state by citizens of such state. But it has been adjudged by this court upon full consideration that a suit against a state by one of its own citizens, the state not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a state by citizens of another

common carrier to exempt itself from the liabilities imposed.[3]

But clear as is the legal right, invalid as is the substitute compensation program, neither in the FELA nor in the Alabama statutes prescribing the physical operation of this [fol. 132] interstate carrier is there enough material out of which to extract even the faintest notion of a waiver of that traditional immunity which Alabama painstakingly has additionally preserved by its own express constitutional provision. . .

The suit therefore must fall. But we should not by our discussion couched in language of a *constitutional* immunity apart from the Eleventh Amendment foreclose remedial action by Congress or, perhaps, judicial relief in its own courts at the hands of agencies of the United States Government whose statutory policy may not be thwarted by this plea.

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state of the Union, or by citizens or subjects of foreign states. Hans v. Louisiana, 134 U.S. 1, 10, 15 [33:842, 845, 847]; North Carolina v. Temple, 134 U.S. 22 [33:849]. It is therefore an immaterial circumstance in the present case that the plaintiffs do not apear to be citizens of another state than Alabama, and may be citizens of that state."

[3] "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *." 45 USCA § 55.

[fol. 133]

APPENDIX II.

CODE OF ALABAMA 1940 (RECOMPILED 1958) TITLE 55, SECTION 333.

Composition of board.—There shall be a board of adjustment to be composed of the director of finance, the treasurer, the secretary of state and state auditor. The chairman of said board shall be selected by the board from its members. The secretary of state shall also be the secretary of said board, and shall perform all the duties, powers, and functions required of the secretary by the board. The attorney general shall attend the meeting of the board and represent the state of Alabama in all proceedings before the board. The board of adjustment shall be furnished with necessary quarters, stationery and postage, in the same manner as the same are furnished to other state officers, agencies, commissions, boards, institutions, or departments. Any three of said board members shall constitute a quorum to transact business and discharge the functions of said board; provided, however, that in case there is an equal division of opinion on any decision or claim that the board is authorized to hear, the chairman of the board shall determine the decision in such instance. The board of adjustment shall have the power, if in their opinion the situation warrants it, to visit any scene of any injury or accident and make a view thereof, and take said facts in consideration and personally interview such persons as may have knowledge or information as to

the subject matter of the claim under consideration by said board, and may take such views and information into consideration in reaching their conclusion and making awards on claims. The board of adjustment shall supervise and direct the secretary of the board as to making a record, as provided in section 341 of this title, and shall aid and direct said secretary in making up a report of all cases heard and determined by said board, stating the substance of the claim and the disposition made of the case, and shall cause said cases to be classified under said board's direction in accordance with the types and kinds of cases coming before said board. For the additional duties imposed upon the state auditor by this section, he shall be allowed and paid out of the treasury of the state of Alabama, as the salaries of public officers of the state of Alabama are paid the sum of $600.00 per year, payable in monthly installments of $50.00 each month from and after the effective date of this section. (1935, p. 1164; 1939, p. 602; 1943, p. 386, appvd. July 7, 1943.)

APPENDIX III.

CODE OF ALABAMA 1940 (RECOMPILED 1958) TITLE 55, SECTION 334.

Powers and jurisdiction of the board.—The board of adjustment shall have the power and jurisdiction and it shall be its duty to hear and consider all claims for damages to the person or property growing out of any injury done to either the person or property by the state of Alabama or any of its agencies, commissions, boards, institutions or departments; also, all claims for personal injuries or death of any employee of the state of Alabama, or any of its agencies, commissions, boards, institutions or departments arising out of the course of his employment, or sustained while engaged in the business of the state of Alabama or any of its agencies, commissions, boards, institutions or departments; also, all claims for personal injuries or death of any convict; also, all claims of members of the public at large or of officers of the law arising out of injuries sustained while attempting to recapture escaped convicts, which convicts have escaped after they have been placed in the actual custody of the department of corrections and institutions; also, all claims against the state of Alabama or any of its agencies, commissions, boards, institutions or departments arising out of any contract, express or implied, to which the state of Alabama, or any of its agencies, commissions, boards, institutions or departments are parties, where there is claimed a legal or moral obligation resting on the state; also, all claims for money overpaid on

obligations to the state of Alabama, or any of its agencies, commissions, boards, institutions or departments; also, all claims for money voluntarily paid to the state of Alabama, or any of its agencies, commissions, boards, institutions or departments, where no legal liability existed to make such payment; also, all claims for underpayment by the state of Alabama, or any of its agencies, commissions, boards, institutions or departments, to parties having dealings with the state of Alabama, or any of its agencies, commissions, boards, institutions or departments; also, all claims for money or property alleged to have wrongfully escheated to the state of Alabama. Also, all claims for injury or death of any student duly enrolled in any of the public schools of this state resulting from an accident sustained while being transported to or from school or in connection with any school activity in any bus or any motor vehicle operated directly by any school board or agency of the state or through contract with another. Awards payable to any such student for injuries sustained in such accident shall be equal to the maximum benefits payable to employees as provided in chapter 5 of the Title 26, Code of Alabama, for injuries, loss of time or medical attendance and where death results from such injuries the amount payable to the parent or parents of such student shall be equal to the maximum amount payable to totally dependent parent or parents as provided by chapter 5, Title 26, Code of Alabama; provided, however, that no payment for death of such student shall be made to any parent or parents unless they were actually supporting such student at the time of the accident causing the injuries

and death. The fact that such student has no earning capacity or earns an average wage of less than the amount which would entitle him to maximum benefits under chapter 5, Title 26, Code of Alabama, shall in no way limit an award to him, his parent or parents. Awards for such injuries or death shall constitute a prior and preferred claim against monies appropriated for the minimum program fund and no part of any such award shall be charged against any funds allotted to the school board of the county or city where said accident occurred. If it should appear to the board of adjustment after investigation that the accident causing the injury or death of such student was caused under circumstances also creating a legal liability for damages on the part of any party and it should further appear to the board of adjustment that claim may be made against such party by such student, his parent or legal representative, to recover damages, then, in that event, any payment otherwise due under this section may be withheld by the board of adjustment pending final settlement of such claim and, if said student or his parent or legal representative recover damages against said party, any sum so recovered and collected may be offset against payments due hereunder, and the balance due, if any, shall thereafter be promptly paid by the board of adjustment. The jurisdiction of the board of adjustment is specifically limited to the consideration of the claims hereinabove enumerated, and no others. Provided that nothing contained in this article shall confer upon the board of adjustment any jurisdiction now conferred by law upon the state board of compromise, and nothing con-

tained in this article shall be construed to confer jurisdiction upon the board of adjustment to settle or adjust any matter or claim of which the courts of this state have, or had, jurisdiction. Provided further that the board of adjustment shall have no jurisdiction over claims growing out of forfeitures or of contracts with any state agency, commission, board, institution or department, where, by law or contract, said state agency, commission, board, institution or department is made the final arbiter of any disagreement growing out of forfeitures or of contracts of said state agency, commission, board, institution or department, and, particularly, the board of adjustment shall have no jurisdiction of disagreements arising out of contracts entered into by the highway department. Employees of municipalities, counties, and governmental relief agencies are not to be considered employees of the state of Alabama or of any of its agencies, commissions, boards, institutions or departments, within the jurisdiction of this board, and within the meaning of the word "employee" as used herein. The provisions of this section shall apply to all claims relating to injuries to school children now pending before the board of adjustment or which may be filed with said board within one year of the date of an accident. Minor students shall have, for the purpose of this section, the same power to contract, make elections of remedy, make settlements and receive compensation as adults would have subject to the power of the board of adjustment in its discretion at any time to require the appointment of a guardian to receive monies or awards and payments of awards made to

such minor students or their guardian shall exclude any further compensation either to the minor students or to their parents for loss of service or otherwise. (1935, p. 1164; 1936-37, Ex. Sess., p. 205; 1953, p. 755, appvd. Sept. 9, 1953.)

APPENDIX IV.

OPINION OF THE ATTORNEY GENERAL STATE OF ALABAMA

Jan.-March, 1940 p. 286.

February 29, 1940.

Hon. C. E. Sauls, Director,
Alabama State Docks and Terminals,
Mobile, Alabama.

State Board of Adjustment—Department of State Docks and Terminals—

1. Claims awarded by same are payable from the fund designated by the Board, in the same manner as other charges against the fund are payable.

2. Copy of decree to be paid out of the fund of the Department of State Docks and Terminals should be sent to the Director of the Department of State Docks and Terminals.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 1, 1940, in which you request my opinion as follows:

"On January 18th the State Board of Adjustment awarded J. E. Molamphy the sum of $2,800.00 for

damages done by fire to certain property of his at the State Docks and ordered that a copy of the decree be furnished the Comptroller and that the Comptroller draw his warrant payable to Mr. Molamphy and charge the award against the funds of the State Docks Commission.'

"As I understand it, there has been no specific appropriation by the State to the State Docks out of which this award can be paid. I desire to pay the amount awarded Mr. Molamphy, provided I will incur no risk in so doing.

"Will you kindly advise me whether I am authorized to draw this Department's check to the State Comptroller to reimburse him for the money he is ordered by the Board to pay to Mr. Molamphy, and oblige."

Permit us to preface our comments by setting out in extenso the sections of the act creating the State Board of Adjustment which are pertinent to your inquiry. Act No. 546, H. 871, approved September 14, 1935 (General Acts, 1935, p. 1164) reads in pertinent part as follows:

"Section 3. The State Board of Adjustment in its findings of facts and its findings and decrees as to the amount of payment may also find the agency or agencies of the State of Alabama which inflicted the injury or damage complained of, if the Board finds there is injury or damage done to persons or property, and may adjudge and find that said damage shall be made out of the appropriation made to the agency or department of the

State of Alabama, whose employees, servants, agents or instrumentalities inflicting the damages and injuries complained of. *Provided, however, that said Board may order the payment of any claim out of any fund or funds herein appropriated.*" (Emphasis supplied.)

"Section 4. The Secretary of the State Board of Adjustment shall make a record of and file in the office of the Secretary of State a history of the case, together with the findings and decrees of the State Board of Adjustment and shall deliver to the Comptroller of the State of Alabama a certified copy of the same, and upon receipt of such a copy of the findings of the State Board of Adjustment with the Comptroller, the Comptroller of the State of Alabama is authorized and directed to draw his warrant in favor of the person or persons, association or corporation, found by said State Board of Adjustment to be entitled to the damages in the amount of the damages so certified and shall *charge the same to the appropriations as directed*

"Section 10. There is hereby appropriated out of the general fund of the State of Alabama and the State Insurance Fund, the Confederate Pensions) the Convict Fund or the highway fund, *or any other fund of the State*, to be determined by such Board, a sufficient amount, not exceeding $200,000.00 for the next fiscal year and not exceeding $50,000.00 for any subsequent year, as may be necessary to pay the claims ordered by the Board." (Emphasis supplied.)

This act has been twice amended, but in respects not here material.

Therefore, it appears that the act creating the Board gave to it the authority to require the payment of awards made by it out of any fund of the State that it designated. Section 10 makes an appropriation from every fund of the State in such an amount as it necessary to pay awards ordered to be paid from such funds, subject, of course, to the limitations contained in said section. Section 4 requires the Comptroller to issue a warrant in payment of any award made under the direction of the Board and charge same to the appropriation as directed. As we have pointed out, the appropriation is provided by Section 10.

Although Section 4, *supra*, states that a certified copy of the decree of the Board be sent to the Comptroller, it is undoubtedly the legislative intent that the copy of the decree be sent to the officer who has charge of the disbursement of the fund from which the Board has directed the award to be paid. The reason for the Comptroller to have been specifically mentioned in Section 4 is obvious, since he is the disbursing officer for almost all State funds. It is my opinion that in an award to be paid from the Department of State Docks and Terminals, the copy of the decree would more properly be directed to the Director of that department.

Claims of this sort have been paid in the manner hereinabove set out from the fund of the State Docks Commission, the predecessor of the Department of State Docks and Terminals, in several cases. The records of the Board show that among these are W. E.

Horne, a claim paid out of the fund of the State Docks Commission on the order of the Board in the amount of $300,000. Also, George Sossaman, Administrator of the estate of Leo Lambele, $750.00; Evie D'Olive, $500.00; Mary E. Barnes, $1,500.00.

Our courts have held that the construction given a statute, the language of which is not clear; in the administration thereof over a period of years will lend weight toward that construction. *State v. Tuscaloosa Building & Loan Ass'n.*, 230 Ala. 476, 161 So. 530, 99 A.L.R. 1019; *Waters v. State*, 25 Ala. App. 144, 142 So. 113.

In reaching the above conclusion, the following well known rules of statutory construction also support the same:

The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute, and a particular rule for construing statutes must be regarded as subservient to the end of determining the legislative intent. See cases collated in 18 Alabama Digest 119, Statutes, Key No. 181(1).

A statute is to be construed so as to carry out the intent of the Legislature, though such construction may seem contrary to the letter of the statute, and a liberal interpretation which would defeat the purposes of the statute will not be adopted if any other reasonable construction can be given to it. See cases cited in 18 Alabama Digest 120, Statutes, Key No. 183.

Premises considered, it is my opinion that the copy of the decree referred to in your inquiry should be directed to you, as Director of the Department of State Docks and Terminals, instead of to the Comptroller, and that you should pay the same out of the fund of the Department of State Docks and Terminals.

This matter is being called to the attention of the Board, and upon their sending to you a copy of their decree, drawn in accordance with this opinion, it is my opinion that you should issue a warrant against the fund of your department in the amount so stipulated in the award.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.